HEALTH - RULES: Rules of Division of Health concerning sewage systems are valid.

SEWAGE: Injunction is a proper remedy to prevent a municipality from creating a public nuisance.

March 10, 1949

FILED
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Hon. Wm. Lee Dodd
Prosecuting Attorney
Ripley County
Doniphan, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion of this office, which we restate as follows:

1. Must a city obtain approval from the State Department of Health before it can extend its sewer system?

2. May an injunction be obtained to prevent an extension of a sewage system so as to create a public nuisance?

It is our understanding, from discussions with the officials in the Environmental Sanitation Department of the Division of Health of the State of Missouri, that the Division refuses to approve the plans for the extension of the sewer system of the city of Doniphan because there is no provision for sewage treatment before it is allowed to enter the Current River. It is the position of these health officials that the increased amount of sewage which will thus be disposed will so pollute the Current River that the health and safety of persons below the sewage outlet will be endangered.

The General Assembly provided, in Senate Bill No. 349 of the 63rd General Assembly, for a Department of Public Health and Welfare and within that department a Division of Health. Section 14 of Senate Bill No. 349, Laws of Missouri, 1945, page 949, provides as follows:

> "It shall be the general duty and responsibility of the division of health to safeguard the health of the people in the state and all its subdivisions. It shall make a study of the causes and prevention of diseases. It shall designate those diseases which are infectious, contagious, communicable or dangerous in their nature and shall make and enforce adequate orders and findings to prevent the spread of such diseases and to determine the prevalence of such diseases within the state. * * *" (Underscoring ours.)

Section 13 of Senate Bill No. 349, supra, provides that all powers and duties heretofore under administration and control of the State Board of Health shall be assigned to the Division of Health.

The State Board of Health was created by an act of the Legislature in 1883. At that time the powers and duties of the Board were set out in Section 3 of the act creating the Board, and were as follows:

> "It shall be the duty of the state board of health to safeguard the health of the people in the state, counties, cities, villages and towns. It shall make a study of the causes and prevention of diseases and shall have full power and authority to make such rules and regulations as will prevent the entrance of infectious, contagious, communicable or dangerous diseases into the state. It may send representatives to public health conferences when deemed advisable, and the expenses of such representatives shall be paid by the state as provided in this chapter for expenses of the members of the state board of health."

This statute has come down through the revisions in the same form as when originally enacted and is now Section 9735, R. S. Mo. 1939.

Present Section 9748, R. S. Mo. 1939, originally enacted in 1883, provides as follows:

> "All rules and regulations authorized and made by the state board of health in accordance with this chapter shall supersede as to those matters to which this article relates, all local ordinances, rules and regulations and shall be observed throughout the state and enforced by all local and state health authorities. Nothing herein shall limit the right of local authorities to make such further ordinances, rules and regulations not inconsistent with the rules and regulations prescribed by the state board of health which may be necessary for the particular locality under the jurisdiction of such local authorities."

Present Section 9750, R. S. Mo. 1939, originally enacted in 1883, provides:

> "Any person or persons violating, refusing or neglecting to obey the provisions of this article or any of the rules and regulations or procedures made by the state board of health in accordance with this article, * * * shall be guilty of a misdemeanor."

In 1919, present Section 9736, R. S. Mo. 1939 was enacted, which reads as follows:

> "The board shall designate those diseases which are infectious, contagious, communicable or dangerous in their nature and shall make and enforce adequate rules, regulations and procedures to prevent the spread of those diseases and to determine the prevalence of said diseases within the state."

It is a rule of statutory construction that all statutes applicable to the subject involved must be read and construed together and effect must be given to each. Little River Drainage Dist. v. Lassater, 29 S. W. (2d) 716, 325 Mo. 493; State v. Naylor, 40 S. W. (2d) 1079, 328 Mo. 335.

In 1928 the State Board of Health adopted certain regulations which were compiled in book form in the Missouri Public Health Manual, Book 5. Part V of Book 5 of the Sanitary Code

contained regulations governing the installation, extension and operation of public sewage systems. Regulations covering sewage systems were filed with the Secretary of State in accordance with the requirements of the Constitution of Missouri, 1945, and are substantially the same as the regulations promulgated by the State Board of Health in 1928. The only change was the substitution of the term "Division of Health" for the term "State Board of Health." Prior to this filing the Division of Health filed with the Secretary of State a designation of diseases which are infectious, contagious, communicable or dangerous in their nature.

Thus, it is seen from the history of the Health Department of the State of Missouri that the power to make rules and regulations in matters concerning the public health and welfare of the people of the State is one of long standing. Likewise, it is obvious that rules and regulations pertaining to sewage disposal have long existed. In all but a few instances municipalities have co-operated with the Health Department in matters pertaining to water supply and sewage disposal. At this time it might not be amiss to point out that the Division of Health is co-operating with other organizations in a study of the problem of stream pollution, and the Governor of Missouri, in his message to the joint session of the 65th General Assembly on January 5, 1949, recommended that laws be passed in furtherance of a program leading to the prevention of pollution of streams in the state.

Many cases involving the powers of health boards have arisen in other jurisdictions. The case of State v. City of Juneau, 300 N. W. 187, was an action by the State of Wisconsin seeking a mandatory injunction to command the city of Juneau to comply with the orders of the State Board of Health and the State Committee on Water Pollution and asking that the city of Juneau be enjoined from discharging inadequately treated sewage into the drainage ditch. In its opinion the court said, l.c. 190, 191:

> "* * * It is principally because municipalities are indifferent to the increasing demands made upon them by our advancing civilization in the field of education, transportation and health that local bodies have been so largely divested of power and been made subject to legislative regulation and supervision by state authority. The case which we are considering is a glaring

instance of the disregard of public welfare in the interest of objecting taxpayers.

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"Under the provisions of ch. 144, neither the State Board of Health nor the State Committee on Water Pollution is obliged to postpone action until the health of a community is impaired or some citizen has died as a result of the pollution of the water of the state. The conditions which lead to such a result are well and scientifically known and the power of these bodies extends to prevention as well as to the remediation of conditions which are destructive of the public health.

"We find no basis for the contentions made by the appellant city that the State Board of Health and the State Committee on Water Pollution have acted beyond and without the powers conferred upon them by ch. 144. Under the statute the Board may order, where it appears that a municipality is cooperating, that the municipality may prescribe its own plan for abating the evil complained of (sec. 144.53 (4), but where, as here, there is entire lack of cooperation and active opposition, under the statute the Board is clearly empowered to prescribe definitely what shall be done. The legislature apparently assumed that when the fact that conditions deleterious to the health of the public were called to the attention of the local authorities, they voluntarily would proceed to remedy them." (Underscoring ours.)

One of the leading cases wherein the powers of the State Board of Health has been considered is Miles City v. Board of Health of State of Montana, 102 Pac. 696. In this case Miles City was preparing to extend its main sewer. The Board of Health held a hearing and determined that an extension of the outlet of the sewer system would produce an unsanitary condition and be dangerous to the health of persons residing below said Miles City. The Board further ordered and directed that the city, as early as practicable, dispose of the sewage of said city in some sanitary manner acceptable to the said Board

of Health. The city contended that it had acquired by prescription the right to discharge its sewage into the Yellowstone River. In considering this matter, the court said, l.c. 698:

> " * * * Furthermore, the right which the state is attempting to assert through the agency of the State Board of Health is a public right - a right to protect the health of the people of the state - and as against such public right, prescription does not run. Commonwealth v. Moorehead, 118 Pa. 344, 12 Atl. 442, 4 Am. St. Rep. 599; 22 Am. & Eng. Ency. Law (2d Ed.) 1109. There is yet another reason why the city cannot acquire such a right by prescription as that against it the state may not invoke its police power. It is now generally conceded that the police power is such a power, inherent in the state for the protection of the public, that the state may not waive or divest itself of the power to exercise it. In re O'Brien, 29 Mont. 530, 75 Pac. 196; 8 Current Law, 36; Portland v. Cook, 48 Or. 550, 87 Pac. 772, 9 L. R. A. (N. S.) 733; 1 Abbott on Municipal Corporations, 209. It would seem to follow, then, as a matter of course, that notwithstanding the length of time the city has enjoyed the privilege of discharging its sewage into the river, the state may, in the interest of the public health and safety, regulate such use, or, if necessary, prevent the continuance of it. Indeed, if the state had consented to the use of the Yellowstone river by Miles City for the purpose of discharging its sewage therein, such consent would not have amounted to more than a license, which the state might revoke whenever public interests require it. Portland v. Cook, above."

The city further contended that the state did not produce any evidence in support of its order. The court, in holding that the city had the burden of showing that the order was not justified, said, Lc. 698:

> " * * * This it might have done by showing (a) that the sewage does not contain any human excrement, and that without such excrement it is not of such character and quantity as to pollute the waters of Yellowstone river; or (b) that the sewage had been rendered harmless by being subjected to some practical method of sewage purification satisfactory to the State Board of Health, or which ought to have been satisfactory to such board. * * *"

In the case of Town of Meredith v. State Board of Health, 48 Atl. (2d) 489, the town of Meredith sought to restrain defendant Board of Health from enforcing certain regulations and orders requiring the plaintiff to install a suitable system of sewerage. The State Board of Health was organized under a statute which provided:

> "'5. Duties. They shall take cognizance of the interests of health and life among the people; shall make sanitary investigations and inquiries concerning the causes of epidemics and other diseases, the sources of mortality and the effects of localities, employments, conditions and circumstances on the public health; shall advise and assist town health officers in making investigations into sanitary matters in their towns; and shall take measures to diffuse among the people such information on the subjects above named as may be useful.'
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> "'The state board of health shall have authority:
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> "'III. To make such rules and regulations as it may deem necessary for the administration of the provisions of the preceding paragraphs.'"

In the oral argument it was insisted that the State Board was nowhere given specific authority to deal with the subject matter of sewers and that therefore the orders directing the establishment of a sewer system were invalid. The laws of the

State of New Hampshire are somewhat broader in this respect than the laws of the State of Missouri in that they specifically provide that no person "'shall construct any public system of sewage disposal, without first submitting to the state board and securing its approval thereof.'" The court cited other sections of New Hampshire law which tended to indicate a bestowal of authority with regard to the sewers upon the State Board. Thereafter, the court said, l.c. 493, 494:

> "These provisions all demonstrate the fallacy of the plaintiff's argument that the entire subject of sewers has been committed to the towns, and the state board of health thereby precluded from exercising any authority with reference thereto.
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> "Furthermore, if it were true, in fact, that the statutes of the State made no specific reference to sewers, we should have no hesitation in holding that the maintenance of proper sewers is a subject necessarily within the field of operations of a board charged with the duty of taking 'cognizance of the interests of health and life among the people.' R. L. c. 147, Sec. 5. It is inconceivable that by wholly failing to take action, any town can, with impunity, jeopardize the water supply and consequently the public health of a considerable portion of the State. Yet this is precisely what the plaintiff claims a legal right to do."
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> (Underscoring ours.)

The case of Board of Purification v. Town of East Providence, 133 Atl. 812, was an appeal from an order of the Board directing the town "'to adopt, use and operate some practicable and reasonably available system or means to prevent'" pollution of a river by the emptying therein of raw sewage. The order further required the submission to the Board of "'a plan or statement describing the system or means which said town of East Providence proposes to adopt.'" This order was made in the year 1926. The court went on to recite that as early as 1921 the Board called the authorities of the town into conference in an attempt to stop pollution of public waters by the dumping of town sewage. Thereafter,

the Board repeatedly called into conference the officials of the town and, seeing no prospect of any immediate voluntary action by the town, took the above action. The town asked that the court consider the possibility that the town meeting would not vote the funds provided for carrying out the order, and if it did not, the town could not comply with the order of the Board. In this respect the court said, l.c. 814, 815:

> " * * * If the state has power to make the order, we shall not assume that the town will disobey it. In any event, difficulty of enforcement is not a valid argument for unconstitutionality. Nor is there merit in the claim that appellant is deprived of the equal protection of the law, or that the burdens of the state are not fairly distributed because the board has acted against the town of East Providence and not taken a similar action against the cities of Providence, Pawtucket, or Central Falls. East Providence is polluting the river. It is violating the statute. The board, after an extended display of patience, has seen fit to perform its prescribed duty 'to regulate or prohibit pollution of the waters of the state.' In passing, we may observe that the evidence indicates that some attempts have been made by other cities to met the board's suggestions, and that the board has not given up the hope of amicably arranging matters with the other cities. In the case of East Providence, the evidence shows that the answer always has been that nothing can be done until the financial town meeting takes favorable action, and that such meeting always takes the position that conditions in the upper harbor at Providence are worse than in the Seekonk in East Providence, and therefore it will not act. What other cities have done or are doing, however, is entirely immaterial as far as the present order to East Providence is concerned. Such a defense, if good, would effectually block all attempts of the state to preserve and protect public health.

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> " * * * After all the delay and disclaimers of personal responsibility by the town solicitor and the town council based upon inaction of the financial town meeting, the board was well warranted in ordering that definite action be taken to meet its resaonable demands. The financial town meeting cannot be permitted by past and suggested future inaction to pay no heed to the legitimate orders of the state. The board might have forbidden absolutely further pollution by raw sewage. Its orders are not vague. It intentionally left the handling of the local problems to East Providence. The board under the act could have specified a system. Under the circumstances it wisely preferred to leave the system to the town. The action of the board from the start, instead of being arbitrary, has been indulgent."

The above case was followed in Board of Purification of Waters v. Town of Bristol, 153 Atl. 879.

The case of Department of Health of New Jersey v. City of North Wildwood, 122 Atl. 891, was one wherein the plaintiff asked for a mandatory injunction to order the defendant to cease pollution of waters by its sewage disposal system and to compel a different and proper sewage system. The city, for a defense, interposed that the cost of erecting a proper sewage disposal plant would exceed the legal limit of its bonded indebtedness. In disposing of this contention the court said, l.c. 891:

> "Clearly, to my mind, there is nothing in any of this which constitutes a defense to the bill. The Legislature has imposed upon defendant the obligation to do the very thing of which complainant prays this court do enforce the performance, and has provided that complainant may apply to this court for such enforcement. The mere fact that defendant cannot legally perform by means of issuing bonds does not show that it cannot legally perform at all. It has the taxing power wherewith to raise funds for the purpose; possibly also the power to do so by special assessment. * * *"

In the case of State Board of Health v. City of Greenville, 98 N. E. 1019, the State Board of Health entered an order reading as follows:

> "'That the city of Greenville should be required to purify its sewage in a manner satisfactory to the State Board of Health, on or before October 1, 1909.'"

The city sought to enjoin the State Board of Health from taking any steps or proceedings to enforce its order and from imposing or enforcing or causing to be enforced the fines, forfeitures and penalties provided by law. The State Board was acting under a statute which gave it the power to determine the need for improvements or changes necessary to abate a nuisance caused by cities or persons discharging sewage or other wastes into waters. In the course of its opinion the court said, l.c. 1024, 1025:

> "* * * Cities are no longer inclosed by stone walls and separate and apart from the balance of the state. The sanitary condition existing in any one city of the state is of vast importance to all the people of the state, for, if one city is permitted to maintain unsanitary conditions that will breed contagious and infectious diseases, its business and social relation with all other parts of the state will necessarily expose other citizens to the same diseases. But with the wisdom or folly of withholding from the local authorities final discretion over these matters, we are not concerned. It is beyond question the right of the General Assembly to do so, and the court need not, and ought not to, inquire what motive moved it in withholding such power.
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> "The disposal plant is for the benefit of the residents of the city. It is the primary duty of the city to provide for sanitary disposal of its sewage, and it is not in violation of any provision of the Constitution that it should bear the entire cost of erecting and maintaining a purification plant, and to require it to do so is not an arbitrary, unreasonable, or unfair exercise of the police power of the state. State

ex rel. v. Freeman, 61 Kan. 90, 58 Pac. 959, 47 L. R. A. 67; State ex rel. Bulkeley v. Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465.

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"In this case it is apparent that the tax is levied for governmental purposes clearly within the powers of the General Assembly, notwithstanding it is especially for the needs and the benefits of the city of Greenville and is primarily for the corporate purposes of the city of Greenville. This fully appearing, it is not arbitrary or unfair to require the city to bear the burden and to conform to the orders and requirements of the State Board of Health by discontinuing the discharge of its sewage into a living stream and providing a proper disposal plant, so that the health of not only the citizens of the state residing in that city shall be preserved and protected, but of all the people in the state coming in business or social relation with them. The state would be powerless to perform this important function of government if the local officers were permitted to exercise their discretion in levying or refusing to levy a tax for that purpose."

The case of State ex rel. Shartel v. Humphries, 93 S. W. (2d) 924 (Mo. Sup.), was one wherein the State, at the relation of the Attorney General and the State Board of Health, as relators, proceeded in mandamus to compel Maplewood and Richmond Heights, and their officers, to do certain things respecting sewer outlet and connections, all for the purpose of abating a public nuisance.

In its petition the relator, State Board of Health, stated that it had endeavored to persuade the officers of said city to come to some agreement or plan to abate the nuisance caused by the overflow of sewage from sewers. After numerous conferences the city officials failed to agree on some plan, and thereafter the State Board of Health held a meeting and found "that the nuisance is a menance to the people of Missouri; * * * that polluted water from seepage will affect persons coming in contact with it and cause typhoid

fever." The writ was issued, and upon appeal the judgment was affirmed.

In the case of State v. Curtis, 4 S. W. (2d) 467, the court said, l.c. 469:

> "Proper disposition of sewage is essential to public health, and the passage of laws making such possible is obviously a proper exercise of the police power. Morrison v. Morey, 146 Mo. 543, loc. cit. 562, 48 S.W. 629; Dillon on Mun. Corp. pars. 93-96; Cooley on Taxation (4th Ed.) 202. * * *"

In the case of Riggs v. City of Springfield, 126 S. W. (2d) 1144, the Supreme Court of Missouri said, l.c. 1153:

> "Under no circumstances however would the city be privileged to create or maintain a public nuisance in the exercise of its use of the easement. The grant of power to a municipality to condemn for sewer purposes presumes a lawful exercise of the power conferred, and the authority to create a public nuisance will not be inferred. See Joyce on Nuisances, Sec. 284. The right of the city to empty its sewage into a stream or a river is merely a legislative license, revokable whenever the public health and safety require. Van Cleve v. Passaic Valley Sewerage Commissioners, 71 N.J.L. 183, 58 A. 571. Furthermore, the State Board of Health, under Section 9015, R. S. Mo. 1929, Mo. St. Ann. Sec. 9015, p. 4178, has imposed upon it the duty 'to safeguard the health of the people in the state, counties, cities, villages and towns.' We recognize the fact that pollution abatement is a subject of national importance. President Roosevelt in a message to the Congress of the United States on February 15, 1939, devoted exclusively to this subject, said that while no quick and easy solution to the problem is in sight that many state agencies have forced remedial action where basic studies have shown it to be practical."
> (Underscoring ours.)

It has been pointed out above that the statutes creating the State Board of Health of Missouri, and subsequent enactments, have given the Division of Health the power and authority to promulgate rules and regulations to prevent the spread of infectious, contagious, communicable or dangerous diseases. Pursuant to this authority, the Division of Health has promulgated specific regulations covering the alteration to sewage works, as follows:

> "Sec. 4. Submission of Plans for Alteration to Sewage Works - Every owner or his authorized agent, before making or entering into contract for making alterations or changes in, or additions to, any existing sewer system or sewage treatment plant shall submit to and receive the written approval of the Division of Health of complete plans and specifications fully describing such alterations, changes or additions, and thereafter such plans and specifications must be substantially adhered to unless deviations are submitted to and receive the written approval of the Division of Health.
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> "Sec. 7. Disposal of Sewage - No sewage shall be placed or permitted to be placed or discharged or permitted to flow into any of the waters or upon any of the lands of the state in any manner determined by the Division of Health to be prejudicially affecting a public water supply or causing a nuisance."

The Division of Health in promulgating the regulations set out above, as well as many others, is carrying out its general duty to safeguard the health of the people in this state and all its subdivisions. In the case of State v. Curtis, supra, the Supreme Court said that the proper disposition of sewage is essential to public health.

Missouri has adopted the rule that powers conferred on a health Board should receive a liberal construction. In the case of Hughes v. State Board of Health, 159 S. W. (2d) 277, the Supreme Court of Missouri said, l.c. 279:

> " * * * it is a wholesome and well-recognized rule of law that powers conferred upon boards of health to enable

> them effectually to perform their important functions in safeguarding the public health should receive a liberal construction. * * *"

Therefore, we believe that it is within the power and authority granted the Division of Health to promulgate regulations concerning the extension of sewage systems. As will be seen later, since the Division of Health has authority to abate a public nuisance, so we believe it clearly within the scope of its authority to require municipalities and others to seek approval of their alteration plans so that public nuisances will not arise. By this we do not mean to say that the Division of Health may be arbitrary or capricious in approving plans for an alteration, and if a city is so aggrieved, it has its recourse to the courts.

In answer to the second question, we again point out that Section 9750, R. S. Mo. 1939, provides that any person or persons violating, refusing or neglecting to obey any of the rules or regulations made by the State Board of Health shall be guilty of a misdemeanor. Therefore, one method of procedure would be for the prosecuting attorney of the county to file against such persons under Section 9750, supra. Another method would be to file an injunction suit against the municipality before a court of equity for the purpose of abating a public nuisance. In State ex rel. Attorney General v. Canty, 207 Mo. 439, l.c. 456, 105 S.W. 1072, the court said:

> "It never was the law, in the absence of legislative authority, that courts of equity could enjoin the commission of crime generally. (Crawford v. Tyrrell, 127 N. Y. 341.)
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> "This court has uniformly held that a court of equity has no jurisdiction to enjoin the commission of a crime, but that resort must be had to the criminal courts, which possess ample power to punish and prevent crime. (State ex rel. v. Schweickardt, 109 Mo. 496; State ex rel. v. Zachritz, 166 Mo. 307; State ex rel. v. Uhrig, 14 Mo. App. 413.)."

However, the court, disposing of the contention made by defendants, said, l.c. 459:

> "The contention of respondents that a court of equity has no jurisdiction to abate a public nuisance where the offenders are amenable to the criminal laws of the State is not tenable, as is fully shown by the following authorities: 2 Story's Equity Jurisprudence (13 Ed.), secs. 923 and 924; Crawford v. Tyrrell, 128 N. Y. 341; People v. St. Louis, 48 Am. Dec. 340; 21 Am. and Eng. Ency. Law (2 Ed.), 704; Attorney-General v. Jamaica Pond. Aq. Corp., 133 Mass. 361; Carleton v. Rugg, 149 Mass. 550; Reaves v. Oklahoma, 13 Okla. 403."

In Attorney General v. Jamaica Pond Aqueduct Corp., 133 Mass. 361, a corporation chartered to supply fresh water to the public was enjoined from doing certain things which would constitute a public nuisance. At l.c. 363 of 133 Mass. the court said:

> "This information, therefore, can be sustained on the ground that the unlawful acts of the defendant will produce a nuisance, by partially draining the pond and exposing its shores, thus endangering the public health.
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> "The defendant contends that the law furnishes a plain, adequate and complete remedy for this nuisance by an indictment, or by proceedings under the statutes for the abatement of the nuisance by the board of health. Neither of these remedies can be invoked until a part of the mischief is done, and they could not, in the nature of things, restore the pond, the land and the underground currents to the same condition in which they are now. In other words, they could not remedy the whole mischief. The preventive force of a decree in equity, restraining the illegal acts before any mischief is done, gives clearly a more efficacious and complete remedy. Cadigan v. Brown, 120 Mass. 493."

In Board of Health of Lyndhurst, tp. v. United Cork Companies, 172 Atl. 347, 116 N. J. Eq. 4, affirmed Err. & App. 176 Atl. 142, 117 N. J. Eq. 437, operation of a cork factory producing conditions "hazardous to public health" was enjoined as a public nuisance, and, at l.c. 351 of 172 Atl., the court said:

> "Nor is there any legal merit to the insistment that the public nuisance here assailed is not 'hazardous to the public health' and, therefore, neither cognizable nor enjoinable in this statutory proceeding, since no one has been shown to have actually become afflicted with disease as a result thereof. The fallacy of this contention is in the fact that it would make the statutory operation dependent upon the existence of actual injury instead of mere hazard."

At the same page, the court quoted with approval the following:

> "'Manifestly, the law-making power did not intend to create a board of health with power to act only when and after they had watched the "source of foulness" from its beginnings and along its various grades of progression, until it has embraced the strong, debilitated the health, and prostrated the weak.'"

In the cases above cited the court was referring to a statute authorizing a board of health to maintain a suit for an injunction to abate a "nuisance hazardous to public health." This rule that a public nuisance hazardous to public health may be abated before actual injury occurs applies to a public nuisance in Missouri, because here even a threatened public nuisance may be abated by injunction.

In State ex rel. v. Canty, supra, the Supreme Court of Missouri followed this doctrine, l.c. 457, 458 (207 Mo.):

> "'A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the Attorney-General of England, and at the suit of the state, or the people, or municipality or some proper officer representing the commonwealth, in this country.'

* * * * * * *

> "They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals or safety of the community."

As to who may institute the action, the Missouri Supreme Court held in State ex rel. Lamb, 237 Mo. 437, l.c. 455, 141 S. W. 665:

> "Our conclusion is that the prosecuting attorney was authorized by law to institute a suit in the circuit court of Chariton county to enjoin, in behalf of the State, a public nuisance, and that he could proceed without giving bond. * * *"

In the case of State ex rel. Wear v. Springfield Gas & Electric Co., 204 S. W. 942, the court said, l.c. 946:

> "In the case at bar the position of the state is stronger than in the case of People v. Truckee Lumber Co., supra, because here the state is by statute the owner of the fish in Jordan and Wilson creeks, and by statute (section 1007, cited supra) the prosecuting attorney is directed to institute and prosecute all civil and criminal actions in his county where the interests of the state are concerned. We do not wish to be understood as indicating that we think that the authority to institute and prosecute a cause of the character with which we are now dealing is exclusively in the prosecuting attorney. Section 970, R. S. 1909, would, in our judgment, authorize the Attorney General to institute on

> behalf of the state equitable proceedings to enjoin the destruction of fish in the manner set out in plaintiff's petition, not only on the ground that the state is the owner of the fish, and therefore concerned, but also on the ground that to pollute the streams of the state that are the habitation of fish is a public nuisance, and may be enjoined on that ground; there being property rights involved. State ex rel. Canty, 207 Mo. supra; Hamilton Brown Shoe Co. v. Saxey et al., 131 Mo. 212, 32 S. W. 1106, 52 Am. St. Rep. 622."

Also, in the case of State ex rel. Shartel v. Humphreys, 93 S. W. (2d) 924, the court said, l.c. 927:

> "The next question is: Did relators have authority to institute and prosecute this cause? The nuisance sought to be abated was a public nuisance, and a grievous one, and it also appears, as alleged, that the State Board of Health endeavored, without avail, to get Maplewood and Richmond Heights to agree upon some plan. Despairing of any relief by conference and persuasion, the State Board of Health brought the matter to the attention of the Attorney General and this cause was filed. Section 9015, R. S. 1929, Mo. St. Ann. Sec. 9015, p. 4178, makes it the duty of the State Board of Health 'to safeguard the health of the people in the State, counties, cities, villages and towns,' and under the facts here the Attorney General could have properly proceeded with or without joining as relator with the State Board of Health. Section 12276, R. S. 1929, Mo. St. Ann. Sec. 12276, p. 586; 46 C. J. 740; State ex rel. Crow v. Canty, 207 Mo. 439, 105 S. W. 1078, 15 L. R. A. (N.S.) 747, 123 Am. St. Rep. 393, 13 Ann. Cas. 787; State ex rel. Lamm v. City of Sedalia (Mo. App.) 241 S. W. 656; State ex rel. Detienne v. City of Vandalia, 119 Mo. App. 406, 416, 94 S.W. 1009." (Underscoring ours.)

In 39 C. J. S., Section 36, page 860, the rule is stated:

> "Health authorities may maintain suits in equity to enjoin or restrain acts which are a menance to the health of the public, even before actual injury has been inflicted; indeed, this has been held to be the proper remedy where there is doubt as to the existence of a nuisance. * * *"

Therefore, we believe that an injunction suit would be a proper remedy to prevent a municipality from extending its sewer system so as to create a public nuisance.

Conclusion.

It is the opinion of this department that (1) since the Division of Health has promulgated valid rules and regulations under authority of law covering the extension of sewer systems, a city must obey these rules and regulations in making alterations thereto, and (2) a proper remedy to prevent a municipality from extending its sewer system so as to create a public nuisance is by injunction.

Respectfully submitted,

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APPROVED:

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JRB:ml